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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5323

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THE STATE OF TEXAS

v.

DAVID HERNANDEZ APODACA

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Appeal from the County Court at Law Number Two
El Paso County, Texas

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# JURISDICTIONAL STATEMENT

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Appeal from the County Court at Law Number Two
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## JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment of the County Court at Law Number Two for El Paso County, Texas, finding Appellant guilty of the violation of failing to identify himself by giving a report of his name and address.

### A. Reports

The court below wrote an opinion. It is not published. A copy of that opinion is attached to this Jurisdictional Statement.

### B. Jurisdiction

1. Appellant was charged in an information with violating Section 38.02 of the Texas Penal Code in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined $40 on the charge.

2. The judgment of the County Court at Law Number Two was entered on July 10, 1979. A Notice of Appeal was filed with that court on the same day.

3. This Court has jurisdiction by virtue of Section 1257(2) of Title 28, United States Code, which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [by] appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the Texas Code of Criminal Procedure, no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed does not exceed $100. Article 4.03 provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court, or the county court at law shall not exceed one hundred dollars.

4. The Texas Court of Criminal Appeals has previously held that where one is fined less than $100 in a county court at law, there is no appeal to the Texas Court of Criminal Appeals. Coates v. State of Texas, 308 S.W.2d 869 (Tex. Ct. Crim. App. 1957). See also, Williams v. Florida 399 U.S. 78 (1970).

5. In this appeal, Appellant questions the constitutionality of Section 38.02(a) of the Texas Penal Code, which provides as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

C. Questions Presented

QUESTION I: Section 38.02(a) of the Texas Penal Code violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague on its face.

QUESTION II: Section 38.02(a) of the Texas Penal Code violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is overbroad on its face in that it makes criminal and indeed punishes conduct protected by the Constitution.

D. Statement of the Case

On June 29, 1979, El Paso Police Patrol Officers Phillip Meads and Armando Salas responded to a call reporting a gang fight in the northeast part of El Paso (T. 10-11). As they arrived in their patrol car, Appellant was seen on his bicycle leaving the area where about 12 to 20 persons had congregated (T. 13, 24). One officer was left at the scene and Officer Meads, in the patrol car, pursued Appellant (T. 25, 26). Meads later found Appellant hiding behind a wall (T. 29). Meads called out to Appellant, telling Appellant he just wanted to speak to Appellant (T. 29), and that Appellant was not under arrest (T. 32). The officer asked Appellant to return to the scene with him, but Appellant refused. Appellant was verbally abusive to the officer and also made an obscene gesture. He was placed under arrest for disorderly conduct and then apparently swung at Officer Meads and resisted arrest (T. 34, 35).



Appellant was eventually taken to the station house and was again asked to identify himself (T. 46). Appellant mentioned three names and two addresses, all nonexistent (T. 46). The officers finally were able to determine Appellant's name from fingerprint records. Appellant refused to give his name because he did not want anyone to know he was on probation (T. 52, 53, 72). Appellant made it clear that he simply did not want to speak with the officers (T. 56). No Miranda warnings were given to Appellant (T. 72).

What had originally been thought to be a gang fight was actually only a threatened fight between an adult male (Varnado) and Appellant's 15 year old cousin. Appellant's involvement, it appears, was simply that he had offered to take his cousin's place in the fight. It was at that point that the police arrived and Appellant fled (T. 77, 78).

E. Substantial Federal Question

Appellant urges this Court to note probable jurisdiction in this case because of the substantial federal questions raised here.

Section 38.02 has been reviewed once before by an appellate court, and that was by this Court in Brown v. Texas, 99 S.Ct. 2637 (June 25, 1979). In Brown, this Court held that Section 38.02 as applied on the facts of that case denied Brown his rights under the Fourth Amendment. In that unanimous opinion Chief Justice Burger stated:

> We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements . . . . The County Court judge who convicted Appellant was troubled by this question, . . . 99 S.Ct. at 2641, fn. 3.

In this case there was more than an investigatory stop. There was an arrest on two other charges, disorderly conduct

and resisting arrest, before the failure to identify charge was raised. It is not a question of the application of the statute in this case. The issue is whether the statute is unconstitutional on its face. Continued use of the statute even subsequent to Brown v. Texas calls for a decision from this Court on the constitutionality of the statute. Several other states, including California and various municipalities, have similar statutes.

In a case considered in tandem with Brown v. Texas, this Court did review the constitutionality of a similar law, a Detroit, Michigan, ordinance. Michigan v. DeFillippo, 99 S.Ct. 2627 (1979). In DeFillippo, only the initial stop was undertaken under color of the stop and identify ordinance. The defendant there was actually arrested for other violations, much like Appellant in this case. This Court held that since the arresting officer did not know the ordinance was unconstitutional, the exclusionary rule would not be applied.

In applying the DeFillippo and Brown decisions to this case, there is some confusion. In Brown, which involves this specific statute, this Court specifically left open the constitutionality of the stop and identify statute. In DeFillippo, this Court apparently agreed for purposes of the case that the Detroit ordinance was unconstitutional. Indeed, the dissent by three justices stated as follows:

> The Court does not dispute this analysis [that the ordinance cannot punish conduct protected by the Constitution]. Rather, it assumes that respondent had a right to refuse to cooperate with the police inquiries, that the ordinance is unconstitutional, and that henceforward the ordinance shall be regarded as null and void.

The problem is that while in one decision this Court apparently agreed with the Supreme Court of Michigan that the



stop and identify ordinance was void for vagueness and was therefore null and void, it expressly left open the question of the constitutionality of the Texas stop and identify law which is drafted in language which is less precise than the Detroit ordinance. Texas has, therefore, taken the position that Section 38.02 is constitutional and is enforceable.

Over a period of time, this Court has held applicable to the states the First, Fourth, Fifth, and Sixth Amendment to the United States Constitution through the Due Process Clause of the Fourteenth Amendment. Thornhill v. Alabama, 310 U.S. 88 (1940); Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); and Gideon v. Wainwright, 372 U.S. 335 (1963).

In addition to those rights, this Court has also held that certain fundamental and procedural due process rights were applicable to the states through the Fourteenth Amendment Due Process Clause. Among those is the requirement that penal statutes be drafted in such a manner that the conduct which they purport to prohibit is clearly ascertainable from a reading of the statute. Connally v. General Const. Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

The words of the statute, particularly "lawfully stopped," are so imprecise that one might feel that the words might not be applicable in his case. As an example see Norwell v. Cincinnati, 414 U.S. 14 (1973), where a man was stopped and questioned and "nonprovocatively" voiced his objection to the stop and was arrested for disorderly conduct.

To be constitutional a statute must have ascertainable standards of guilt so as to give a reasonable notice of the conduct which it purports to prohibit. Palmer v. Euclid, 402 U.S. 544, 545 (1971). Inasmuch as this Court has made

it quite clear that one has the right to remain silent, Miranda v. Arizona, 384 U.S. 436 (1966), and the right to object, verbally and nonprovocatively, to a stop, the public might in fact believe that one may remain silent when confronted by a police officer. Indeed, those principles were reaffirmed in DeFillippo.

In addition to facial vagueness, Section 38.02 is also unconstitutional because it is overbroad on its face. A statute may be attacked for facial vagueness and overbreadth even if it appears valid as applied to the conduct of the accused raising the issue. Plummer v. Columbus, 414 U.S. 2 (1973).

Clarity must exist not only as discussed in the vagueness problem above, but also in the scope of application of the statute. Where a statute possibly makes criminal protected conduct, it is overbroad. Gooding v. Wilson, 405 U.S. 518 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Plummer v. Columbus, supra; and Hess v. Indiana, 414 U.S. 105 (1973). In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." Cantwell v. Connecticut, 310 U.S. 296 (1940); Ashton v. Kentucky, 384 U.S. 195 (1966); and Keyishian v. Bd. of Regents of U. of St. of N.Y., 385 U.S. 589 (1967).

With respect to Section 38.02(a), it is possible that a similar statute could have been drafted so as to cure its overbreadth. The caption of the section states: "Failure to Identify as Witness," but the body of the provision does not



mention the word "witness." The section on its face applies to everyone, witnesses and nonwitnesses alike. There is, however, an indication that the overbreadth was not intended by the legislature.

Section 38.02(a) replaced Article 2.24 of the Texas Code of Criminal Procedure, which was repealed in 1973 upon the enactment of Section 38.02(a). Article 2.24 provided as follows:

Identification of Witnesses

> Whenever a peace officer has reasonable grounds to believe that a crime has been committed, he may stop any person whom he reasonably believes was present and may demand of him his name and address. If such person fails or refuses to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of a magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

This old Article 2.24 which was repealed has several useful points not found in new Section 38.02(a). First, it specifically states that the officer must have reason to believe that a crime was committed. Second, it was not a penal statute and did not give the officer the unfettered right to place a subject under arrest for the mere refusal to speak. Third, a neutral and detached magistrate made the final decision, and presumably if the officer could not show that the subject was a witness to a crime, not even the magistrate could compel the subject to state his name.

New Section 38.02(a) has none of the foregoing protections and can apply to anyone whether a crime was committed or not. This Court has long recognized the right of a state to question material witnesses to a crime, and indeed to detain them if necessary. Stein v. New York, 346 U.S. 156, 184 (1953). See also, Rule 46(g), Federal Rules of Criminal Procedure, and

Section 3149, Title 18, United States Code. In expanding the statute here beyond the reach of material witnesses, the legislature made the statute too broad and, therefore, unconstitutional because the new statute then made criminal conduct protected by the First, Fourth, and Fifth Amendments as applied to the states through the Fourteenth Amendment Due Process Clause.

The right to remain silent, completely silent, in the face of police questioning is a right protected by several of the amendments to the Constitution. Among them would be the Fourth, Fifth, and the general "right to be let alone . . . ." Michigan v. DeFillippo, supra, at p. 2636 (dissent).

If one has the right to protest an arrest, Norwell v. Cincinnati, supra, or to use profane or displeasing speech, Terminiello v. Chicago, 337 U.S. 1 (1949); Eaton v. City of Tulsa, 415 U.S. 697 (1974); and Hess v. Indiana, 414 U.S. 105 (1973), can the right to remain silent be any less secure?

Compelling speech when the Constitution protects silence is a violation of both the Fourth and Fifth Amendments, much like the forced production of private records. Boyd v. United States, 116 U.S. 616 (1886). And punishing one for the invocation of a constitutional right, such as the right to remain silent, is also prohibited by the Constitution. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Albertson v. SACB, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Haynes v. United States, 390 U.S. 85 (1968); and Leary v. United States, 395 U.S. 6 (1969).

There are cases in which this Court has held constitutional compelled speech or reports. California v. Byers,



402 U.S. 424 (1971); Shapiro v. United States, 335 U.S. 1 (1948); and United States v. Sullivan, 274 U.S. 259 (1927). In those cases, however, there were overpowering state or federal interests to which constitutionally protected activities or rights were subordinated.

An examination of the interests conceivably sought by the state in this case are not so strong that one might set aside constitutionally protected rights. Furthermore, where a more carefully drawn statute could protect both interests, the statute must also fall. If the Detroit ordinance is void for vagueness, can the more imprecise Texas statute be constitutional?

In this case the state might argue that having the name of an accused makes for good police work or for more efficiency in the criminal justice system. Perhaps it is so. But having one's name certainly subsequent to arrest is not truly necessary. Courts may compel various forms of identification from a defendant. United States v. Wade, 388 U.S. 218 (1967); United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263 (1967); United States v. Mara, 410 U.S. 19 (1973); and Cupp v. Murphy, 412 U.S. 291 (1973).

Where one refuses to provide his identity, the refusal may be a factor in considering bail, but it should not furnish the basis for further criminal prosecution. The stop and identify statute simply gives the police or prosecutor too much of an opportunity to stop persons on a pretext or to punish those who object to arrests or remain silent. It now makes criminal that which law students understand, the John Doe charge, plus a forced plea of not guilty for that accused

who chooses to stand mute even in the courtroom.[1] The stop and identify law "commands that which the Constitution denies the state power to command and makes a crime out of what, under the Constitution, cannot be a crime. Coates v. City of Cincinnati, 402 U.S. 611 ... (1971)." Michigan v. DeFillippo, supra at p. 2636.

The stop and identify law simply has us go full circle to bite our own tail--that is, to mandate that officers advise defendants of their right to remain silent after arrest, then to have the accused charged with a crime for the invocation of the right to remain silent. The accused simply has the right to remain silent, mute. Assuming probable cause to arrest the accused on other grounds, there are ample other ways available to determine identity.

In the concurring and dissenting opinions in Michigan v. DeFillippo, this Court recognized the fact that stop and identify laws do at least hold out the potential for abuse. Pretextual arrests like the one in Brown can be and are often made. So the laws have a high potential for abuse, while holding out little in the way of a benefit. In the case of a Terry type stop, it has been recognized that one has the right to refuse to speak and simply walk away. In the case of a full detention, even one based on probable cause, one has the right to remain silent. In either event there is no constitutional justification for the stop and identify laws.

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[1] Section 344, Wharton's Criminal Procedure. "The effect of the refusal of a defendant to plead when arraigned is too well known to require discussion. A not guilty plea is entered for him and the case proceeds." Ruckle v. Warden, Maryland Penitentiary, 335 F.2d 336 (4th Cir. 1964), cert. denied, 379 U.S. 934.



Although stop and identify laws have a high incidence of abuse, they are rarely reviewed by appellate courts. The fact that the law is used in Texas but has never been reviewed by a Texas appellate court is simply a manifestation of its pretextual use. Brown v. Texas was simply a rare exception where, for some reason, the prosecution was pursued even though no other violation was turned up. This case is just one where the officers decided to "stack" several charges on the accused. The opportunity to review the law should not be lost.

## Prayer

For all the foregoing reasons, Appellant urges this Court to note probable jurisdiction and to set this case down for full hearing, briefs, and arguments on the merits.

Respectfully submitted,

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## Certificate of Service

I do hereby certify that on this 4th day of September, 1979, a true and correct copy of the foregoing Jurisdictional Statement was mailed to The Honorable Mark White, Attorney General of the State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.

Raymond C. Caballero
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